Tan Cheong Poh & Anor v Teoh Ah Keow

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO A-02-155-1994
VC GEORGE, ABU MANSOR JJCA AND KC VOHRAH J
11 SEPTEMBER 1995

Damages (Personal Injury or Death) *— Personal injuries — Brain damage — Resulting in physical and intellectual disabilities — Award for pain and suffering and loss of amenities — Whether should assess each disability separately and then make allowance for overlapping*

Damages (Personal Injury or Death) *— Personal injuries — Loss of future earnings — Assessment — Lump sum payment — Cause of action arose in 1982 — Whether to consider prospective increments — Whether annuity table must be used — Whether to take into account possibility that injured party would cease employment after marriage — Civil Law Act 1956 s 28A(2)(c)(ii)*

Damages (Personal Injury or Death) *— Quantum — Head injury — Fracture of skull and parietal bone — Brain damage — Permanent severe neurological disabilities*

In 1982, a collision occurred between two motor cycles, one ridden by the plaintiff/respondent ('the plaintiff') and the other by the first defendant/appellant, who was the second defendant/appellant's servant ('the defendants'). The main injury suffered by the plaintiff was a fracture of the skull and parietal bones resulting in brain damage, and she was left with permanent severe neurological disabilities. At the time of the accident, the plaintiff was a 23-year-old unmarried woman, and had been employed as a clerk in a company for RM350 per month. The plaintiff sought damages for personal injuries from the High Court which found the defendants 60% liable. The plaintiff was awarded, inter alia, RM100,000 for pain and suffering and loss of amenities under general damages, RM41,650 for pre-trial loss of earnings, RM63,000 for future loss of earnings, RM39,900 for pre-trial nursing care, and RM61,500.75 for post-trial nursing care to be apportioned accordingly. The defendants appealed and the plaintiff cross-appealed. For the plaintiff, it was contended that the trial judge had underestimated the general damages and should have assessed physical and intellectual impairments which arose from the same brain injury, separately. Then, the two amounts should be aggregated, and a reduction in respect of overlapping be made. In respect of the plaintiff's future loss of earnings, the trial judge obtained RM63,000 in a direct multiplication of the multiplier of 15 years and the loss of earnings at RM350 per month. The annuity tables were not used in the computation. The plaintiff argued that the trial judge erred in failing to take into account the probability that the plaintiff would get increments in years to come. On the other hand, it was

contended for the defendants that the multiplier of 15 years should have been reduced to allow for the fact that the plaintiff was at a marriageable age and that it was probable that she would have ceased to work upon her marriage. The defendant further argued that the award for nursing care was too high as the plaintiff did not require all the services a maid could provide.

Held, upholding the trial judge's award for pain and suffering and loss of amenities, increasing the award for pre-trial loss of earnings to RM47,600, and retaining the awards of future loss of earnings and nursing care:

(1) Where disabilities stem from one injury, the extent of overlap will be such that there would be a merger and hence, allowance for overlapping in computing the award for pain and suffering and loss of amenities is not good enough. In this case, all the disabilities suffered by the plaintiff stemmed from one injury, ie the brain damage, and thus, the judge was right in making a lump sum award instead of making separate assessments for physical and intellectual disabilities, and to allow for overlap thereafter.

(2) It is trite that the appellate court should only interfere with the decision of the trial court if it is satisfied that the judge has acted on a wrong principle of law or has made a wholly erroneous estimate of the damage suffered. While the RM100,000 awarded under general damages was on the low side, it was not so manifestly low that this court should increase the amount.

(3) The court should take into account the plaintiff's prospects of future increment as the cause of action arose in this case in 1982, ie before the coming into force of the new s 28A(2)(c)(ii) of the Civil Law Act 1956 on 1 October 1984. The judge was therefore wrong in not giving an allowance for future increments.

(4) The plaintiff's pre-trial loss of earnings would be increased to RM47,600, after taking into account the allowance for increments. In computing the plaintiff's loss of future earnings, RM500 would be used as her loss of earnings for each month, from the date of trial for the period of the 15 years. In this case, since a lump sum was to be awarded at the judgment date, annuity tables had to be used to determine the amount that should be paid, which if invested to give a return of 5%pa, would provide RM500 per month to the plaintiff for 15 years. The lump sum that should be awarded was approximately RM63,000, which coincidentally was the amount awarded by the trial judge.

(5) Unlike the English practice of taking into account both contingencies and advance payment in selecting the appropriate multiplier, the Malaysian practice has always been that the only factor taken into consideration in reducing the actual working years is contingencies. The reduction for the lump sum payment

A factor is met by the use of the annuity tables. It follows that there is no double deduction in Malaysia.

(6) No allowance was made for the fact that it was probable that the plaintiff would cease gainful employment after her marriage, as to do so would be inconsistent with the realities of modern living. Also, the RM350 per month awarded by the trial judge for care and nursing was about right, as the plaintiff needed the assistance of a full time domestic maid. The fact that the plaintiff was looked after by her parents at home was irrelevant.

[Bahasa Malaysia summary

Dalam tahun 1982, suatu perlanggaran berlaku di antara dua buah motosikal, sebuah daripadanya ditunggang oleh plaintif/responden ('plaintif'), dan sebuah lagi oleh defendan/perayu pertama, yang merupakan pekerja defendan/perayu kedua ('defendan-defendan'). Kecederaan utama yang dialami oleh plaintif ialah fraktur pada tengkorak dan tulang parietal yang mengakibatkan kecederaan otak, dan plaintif ditinggalkan dengan kecacatan neurologi tetap yang serius. Semasa kemalangan itu berlaku, plaintif merupakan seorang perempuan yang belum berkahwin yang berusia 23 tahun, dan telah digaji sebagai kerani di dalam sebuah syarikat untuk RM350 sebulan. Plaintif menuntut untuk ganti rugi kecederaan diri di Mahkamah Tinggi yang memutuskan bahawa defendan-defendan harus menanggung liabiliti sebanyak 60%. Plaintif telah diaward, antara lain, RM100,000 untuk kesakitan dan penderitaan dan kehilangan keselesaan di bawah ganti rugi am, RM41,650 untuk kehilangan pendapatan pra-perbicaraan, RM63,000 untuk kehilangan pendapatan di masa depan, RM39,900 untuk penjagaan kejururawatan pra-perbicaraan, dan RM61,500.75 untuk penjagaan kejururawatan selepas perbicaraan yang mesti diagihkan sewajarnya. Defendan-defendan telah membuat rayuan dan plaintif membuat rayuan balas. Bagi pihak plaintif, telah dihujahkan bahawa hakim perbicaraan telah menganggar kurang ganti rugi am dan sepatutnya mentafsirkan kecederaan fizikal dan intelektual yang berpunca daripada kecederaan otak yang sama, secara berasingan. Kemudiannya, kedua-dua amaun tersebut harus dicampurkan, dan suatu pengurangan dibuat akibat pertindihan yang berlaku. Mengenai kehilangan pendapatan di masa depan plaintiff, hakim perbicaraan telah mendapat RM63,000 dengan pendaraban terus pengganda 15 tahun dengan kehilangan pendapatan pada RM350 sebulan. Jadual anuiti tidak digunakan dalam pengiraan tersebut. Plaintif menyatakan bahawa hakim perbicaraan telah membuat kesilapan kerana gagal mengambilkira kemungkinan bahawa plaintif akan dinaikkan gaji pada tahun-tahun yang akan datang. Sebaliknya, adalah dihujahkan bagi pihak defendan-defendan bahawa pengganda 15 tahun itu patut dikurangkan atas pertimbangan fakta bahawa plaintif sudah layak berkahwin, dan ada kemungkinan bahawa beliau akan berhenti bekerja atas perkahwinannya. Defendan juga berhujah bahawa award untuk

penjagaan kejururawatan adalah terlalu tinggi kerana plaintif tidak memerlukan kesemua perkhidmatan yang boleh diberikan oleh seorang pembantu rumah. A

Diputuskan, mengesahkan award hakim perbicaraan untuk kesakitan dan penderitaan dan kehilangan keselesaan, menambahkan award untuk kehilangan pendapatan pra-perbicaraan kepada RM47,600, dan mengekalkan award untuk kehilangan pendapatan di masa depan dan penjagaan kejururawatan: B

(1) Jika kesemua kecacatan berpunca daripada satu kecederaan, takat pertindihan akan menjadi sedemikian sehingga terdapat suatu penggabungan dan lantaran itu, peruntukan untuk pertindihan dalam pengiraan award untuk kesakitan dan penderitaan dan kehilangan keselesaan adalah tidak memadai. Dalam kes ini, kesemua kecacatan yang dialami oleh plaintif berpunca daripada satu kecederaan, iaitu kecederaan otak, dan oleh itu, hakim adalah betul apabila beliau membuat suatu award sekaligus, dan tidak membuat pentaksiran yang berasingan untuk kecacatan fizikal dan intelektual, dan membenarkan pertindihan selepas itu. C D

(2) Adalah mantap bahawa mahkamah rayuan hanya boleh bercampur tangan dengan keputusan mahkamah perbicaraan jika ia berpuas hati bahawa hakim telah bertindak mengikut suatu rukun undang-undang yang salah atau telah membuat suatu penganggaran kerugian yang dialami yang salah sama sekali. Sungguhpun RM100,000 yang diawardkan di bawah ganti rugi am adalah rendah sedikit, ia tidaklah begitu rendah sehingga mahkamah ini harus menambahkan amaun tersebut. E F

(3) Mahkamah harus mengambil kira kemungkinan kenaikan pendapatan plaintif pada masa depan kerana kausa tindakan timbul di dalam kes ini pada tahun 1982, iaitu sebelum s 28(2)(c)(ii) Akta Undang-Undang Sivil 1956 mula berkuatkuasa pada 1 Oktober 1984. Oleh itu, hakim adalah salah kerana tidak mengambil kira kenaikan gaji pada masa depan. G

(4) Kehilangan pendapatan pra-perbicaraan plaintif akan dinaikkan kepada RM47,000 selepas mengambil kira peruntukan untuk kenaikan. Dalam pengiraan kehilangan pendapatan plaintif pada masa depan pula, RM500 akan digunakan sebagai kehilangan pendapatannya untuk setiap bulan, dari tarikh perbicaraan untuk tempoh 15 tahun. Dalam kes ini, oleh kerana suatu amaun sekaligus akan diawardkan pada tarikh penghakiman, jadual anuiti harus digunakan untuk memastikan amaun yang harus dibayar yang jika dilabur untuk memberikan pulangan 5% setahun akan memberikan RM500 sebulan untuk plaintif untuk 15 tahun. Amaun sekaligus yang harus diawardkan adalah lebih kurang RM63,000, yang secara kebetulan ialah amaun yang diawardkan oleh hakim perbicaraan. H I

(5) Berlainan dengan amalan di England yang mengambil kira kedua-dua luar jangkaan dan bayaran pendahuluan dalam pemilihan pengganda yang sesuai, amalan di Malaysia dari dahulu lagi ialah bahawa faktor tunggal yang diambil kira untuk mengurangkan tahun bekerja yang sebenarnya ialah luar jangkaan. Faktor pengurangan akibat bayaran sekaligus adalah diatasi dengan penggunaan jadual anuiti. Maka, tidak terdapat dua pemotongan di Malaysia.

(6) Pertimbangan tidak dibuat atas faktor bahawa adalah mungkin bahawa plaintif akan berhenti bekerja selepas perkahwinannya, kerana berbuat demikian adalah tidak konsisten dengan kenyataan kehidupan di hari moden ini. Juga, RM350 sebulan yang diawardkan oleh hakim perbicaraan untuk penjagaan dan kejururawatan adalah agak betul, kerana plaintif memerlukan bantuan seorang pembantu rumah sepenuh masa. Hakikat bahawa plaintif dijaga oleh ibu bapanya di rumah adalah tidak relevan.]

Notes

For cases on damages for personal injuries and death, see 6 *Mallal's Digest* (4th Ed) paras 227–1028; [1989] Mallal's Digest 661–733; [1990] Mallal's Digest 498–575; [1991] Mallal's Digest 970–1036; [1992] Mallal's Digest 849–913; [1993] Mallal's Digest 704–741.

Cases referred to

Choy Yin Khoon v Lee Joo Kam & Anor [1988] 1 CLJ 795 (folld)
Jasi Alam v Nohya bin Mustar & Anor [1975] 1 MLJ 166 (folld)
Lai Wee Lian v Singapore Bus Services (1978) Ltd [1984] 1 MLJ 325 (not folld)
Mahamad bin Mahamad Said & Anor v Perianayagam & Anor [1972] 1 MLJ 67 (folld)
Moriarty v McCarthy [1978] 2 All ER 213; [1978] 1 WLR 155 (refd)
Murtadza bin Mohd Hassan v Chong Swee Pian [1980] 1 MLJ 216 (not folld)
Ngooi Ku Siong v Aidi Abdullah [1985] 1 MLJ 30 (folld)
Pattan a/l Sembadayan v Periasamy a/l Vellan [1988] 1 CLJ 826 (folld)
Phuah Jee Suan v Nila Vasu Pallai [1972] 1 MLJ 202 HC; [1973] 1 MLJ 186, CA (folld)
Siti Rahmah bte Ibrahim v Marappan & Anor [1989] 1 CLJ 252 (folld)
Taylor v Bristol Omnibus Co [1975] All ER 1107 (folld)

Legislation referred to

Civil Law Act 1956 s 28A(2)(c)(ii)

Harpal Singh Grewal (AJ Ariffin, Choo & Harpal) for the plaintiff/respondent.

Guy Vareghese (*Shahriza Vareghese & Chandran*) for the defendants/appellants. A

Cur Adv Vult

VC George JCA (delivering the judgment of the court): In this matter, my learned brothers Abu Mansor JCA and KC Vohrah J, having seen this judgment in draft have informed me that they concur with it. Accordingly, this judgment will be the judgment of the court. B

In this judgment, the parties will be referred to in the manner they were referred to in the court below. The plaintiff had sought damages arising from personal injuries suffered as a result of a collision that had occurred on or about 6 October 1982 between two motor cycles, one ridden by the plaintiff and the other by the first defendant, admittedly the servant or agent of the second defendant. At the time of the accident, the plaintiff was an unmarried woman. She was 23 years of age, and had been employed for a couple of years as a clerk/accounting machine operator by a company called Taiping Tyre Sdn Bhd at Taiping, Perak. Her starting salary had been RM350 per month, and at the time of the accident, in her third year of employment, she was still earning only RM350 per month. Her employer had contributed RM40 per month to the Employees' Provident Fund to the account of the plaintiff. C D

The main injury suffered by the plaintiff was a fracture of the skull and parietal bones, resulting in damage to the brain. Although she made a recovery of sorts from the injuries sustained by her, the plaintiff was left with permanent severe residual neurological disabilities which we will go into some greater detail later in this judgment. E

In respect of liability, the parties had agreed that the first defendant had been negligent but that there had been contributory negligence on the part of the plaintiff. It was agreed that liability be apportioned, and the defendants were to be liable to the extent of 60%. F

For the trial, there were agreed documents which included a medical report from the General Hospital, Kuala Lumpur to which hospital the plaintiff had been referred and transferred from the Taiping District Hospital, and another by Dato' Dr Loh Thiam Ghee, a consultant neurologist and physician, who had on 10 June 1991 evaluated the state of the plaintiff. The plaintiff herself did not testify. Her mother did, as did the general manager of the company she had been working for when the accident occurred. G H

The learned trial judge assessed the damages at 100% as follows:

1	Special damages:		
	(a)	Pre-trial loss of earnings	RM41,650.00
	(b)	Pre-trial loss of employer's EPF contributions	RM4,998.00
	(c)	Pre-trial nursing care	RM39,900.00
	(d)	Agreed special damages	RM1,586.00
			RM88,134.00

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2	General damages:	
	(e) Pain and suffering and loss of amenities (including reduction of marriage prospects)	RM100,000.00
	(f) Future loss of earnings	RM63,000.00
	(g) Post-trial loss of employer's EPF contributions	RM7,560.00
	(h) Future nursing care	RM61,500.75
		RM232,060.75

What was before us was an appeal and cross-appeal. In this judgment, we propose dealing with the questions posed to us without following the sequence in which the grounds of appeal were settled or the submissions made.

There was a difference of opinion between the parties and their respective legal advisers in respect of the extent of the disabilities the plaintiff was left with. For the plaintiff, it was contended that the learned trial judge underestimated it. That, it is suggested is the inference to be drawn from the assessment of general damages he had made of RM100,000 'for pain and suffering and loss of amenities including reduction of the prospects of marriage'. Encik Harpal Singh Grewal contended, as he put it, that the plaintiff suffered both physical impairment and intellectual impairment. His submission was that the learned judge should have assessed damages under this head separately for physical impairment and for intellectual impairment, and thereafter, in aggregating the two amounts, made a reduction in respect of overlapping.

Dato' Dr Loh's report relied on by the parties and by the judge sets out the plaintiff's 'severe neurological disabilities' at the time he examined her in June 1991 as follows:

(i) Slowness in her mental response.

(ii) She can only count up to ten without difficulties.

(iii) She could not minus seven from 100 serially.

(iv) Her speech was slow and slurred though appropriate.

(v) She had no abnormal behaviour. She dressed well and was oriented to her environment. Her memory for dates and times was good.

(vi) Her greatest disability was her control of her limb movement. Despite having power, she was not able to control the movements and this made her walk with her feet apart and very unsteady (sic). She needed a tripod and occasionally some help. This had also caused her to have difficulty when performing tasks for her daily living.

(vii) She had no problems with micturition and defecation.

(viii) She had no evidence of dementia.

(ix) She had no fits now though the EEG showed diffused slow waves indicating disturbed brain function. There was no evidence of any tendency to fits.

(x) She had improved since the accident. She would be unlikely to improve further and her handicaps would be permanent. She would be unable

> to lead a fully independent life. Her mobility would be restricted. She would need someone to assist her in certain specific tasks, eg going up and down the stairs and in and around the kitchen during meal times.

Curiously and perhaps inconsistently, the doctor went on to state that the plaintiff showed evidence of 'mild intellectual impairment'. The plaintiff's mother had testified that the plaintiff needed assistance to go to the toilet, to bathe and to change her clothes. She had obviously told Dr Loh about this as can be inferred in the reference to it made by him, in writing the history of the patient as a preamble to his findings. The doctor's opinion was that the plaintiff's disabilities are permanent. We also note that all the disabilities suffered by the plaintiff stem from that one injury, the damage to the brain. Particularly for that reason, we do not agree with Encik Harpal Singh Grewal's submission that the learned judge erred in not having made a separate assessment each for physical disabilities and for intellectual disabilities, and thereafter allow for overlap. In our judgment, particularly where the disabilities stem from the one injury as is the case here all the disabilities being neurological in nature, the extent of overlap will be such that there would be a merger as it were. We note with respectful approval the learned judge in *Pattan a/l Sembadayan v Periasamy a/l Vellan* [1988] 1 CLJ 826, in effect declining an invitation by the plaintiff's counsel to assess different disabilities suffered by the plaintiff separately where they all stemmed from the same brain injury. In *Pattan*'s case, where the injuries suffered and the disabilities resulting therefrom of a 32-year-old male were almost akin to that suffered by the plaintiff in the instant case, the amount awarded for pain and suffering and loss of amenities (in February 1987) was RM75,000. In February 1984, Edgar Joseph Jr J (as he then was), in *Choy Yin Khoon v Lee Joo Kam & Anor* [1988] 1 CLJ 795, in our respectful opinion, properly declined an invitation to make separate awards for different disabilities arising from the same brain injury and awarded to a male plaintiff aged 44 years (at the time of accident) RM80,000 where the disabilities were severe but not, it seems to us, as severe as those in the case of *Pattan* or of the instant plaintiff.

In Singapore, as can be seen from the judgment of their Court of Appeal, the deputy registrar was persuaded by counsel for the plaintiff in *Phuah Jee Suan v Nila Vasu Pallai* [1972] 1 MLJ 202 to award a separate amount for each of six injuries suffered by the plaintiff. On appeal to the High Court, Wee Chong Jin CJ, sitting as a puisne judge, held that that approach in assessing damages for pain and suffering and loss of amenities was wrong. There was a further appeal to the Court of Appeal in whose judgment reported in [1973] 1 MLJ 186, Choor Singh J said at p 188:

> We agree with the Chief Justice that the method suggested by counsel for the plaintiff and adopted by the deputy registrar was entirely wrong. It has been long established that in a claim for damages for personal injuries the court awards a lump sum based on a number of elements or aspects.
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> The most authoritative pronouncement on the requirement that the award should be a lump sum, will be found in *H West & Son Ltd v Shephard* [1964] AC 326 where Lord Pearce said, at p 365:

A '... If a plaintiff has lost a leg, the court approaches the matter on the basis that he has suffered a serious physical deprivation, no matter what his condition of temperament or state of mind may be. That deprivation may also create future economic loss which is added to the assessment. Past and prospective pain and discomfort increase the assessment. If there is loss of amenity apart from the obvious and normal loss inherent B in the deprivation of the limb — if, for instance, the plaintiff's main interest in life was some sport or hobby from which he will in future be debarred, that too increases the assessment. If there is a particular consequential injury to the nervous system, that also increases the assessment ... These considerations are not dealt with as separate items but are taken into account by the court in fixing one inclusive sum for C general damages.'

When there are several injuries, it is not proper to add up what each would be worth separately; there is likely to be some overlap because much of the general handicap and discomfort may be common in both, eg detention in hospital, inability to move about or enjoy recreation. No doubt the combined effect of several injuries may be more than the sum of each taken separately, D as where both arms are handicapped, but usually the effect is the other way. The principle of scaling down the total sum assessed for several injuries on the ground of overlapping is too well established for it to be disregarded. It was reaffirmed and applied recently in *Wieland v Cyril Lord Carpets Ltd* [1969] 3 All ER 1006. In that case there were two injuries, one was an injury to the neck and the other to an ankle and it is difficult to imagine two E more remote injuries. In applying the principle of overlapping, Eveleigh J said at p 1011:

> 'In so far as the injury to the ankle is concerned, I find it difficult to value it in isolation because it does, to a measure, overlap the other injury in the sense that the loss of amenities of life and discomfort experienced by the plaintiff resulted from two simultaneous operating F causes ... It would therefore be wrong in my view to value the second injury as though the first had not taken place and then to add the two figures together.'

In *Mahamad bin Mahamad Said & Anor v Perianayagam & Anor* [1972] 1 MLJ 67, Suffian FJ (as he then was), speaking for the Federal Court said G at p 68:

> With respect we do not think that the learned judge should have taken compensation for each of the two injuries suffered by the plaintiff separately and then just have added them up at the end. The items are not separate heads of compensation. They are only aids at arriving at a fair and reasonable compensation. See *Fletcher v Autocar and Transporters Ltd* [1968] 1 All ER H 726 at p 733. There is an element of overlapping when two or more injuries are suffered simultaneously.

It is to be noted that the Federal Court did not take the view that all that needs to be done was to make an allowance for the overlap. The court set aside the award of the High Court and substituted it by a lump sum award.

I In 1975, Hashim Yeop A Sani J (as he then was) in *Jasi Alam v Nohya bin Mustar & Anor* [1975] 1 MLJ 166 cited and followed *Mahamad* to say at p 167, 'The injuries are so connected that a lump sum compensation for pain and suffering should be awarded.'

That an allowance for overlapping is not good enough was the opinion of the Federal Court expressed in *Ngooi Ku Siong v Aidi Abdullah* [1985] 1 MLJ 30 where it was said at pp 31–32:

> In assessing damages under this head the learned judge classified the injuries under four separate items. The first item relates to facial injuries which include three fractures, loss of nine teeth apart from extensive bruises and swelling over the right half of the face, as described earlier. The learned judge made separate awards for the fractures and the other injuries under this item for which she arrived at the sum of RM31,500 but deduced RM5,500 for overlapping and awarded RM26,000 as damages.
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> In examining this award we confined ourselves to the question whether the judge had applied the correct principle or whether the assessment of damages was perverse (per Salleh Abas FJ, as he then was, in *Lim Eng Kay v Jaafar bin Mohd Said* [1982] 2 MLJ 156 at p 158 and *Rasidin bin Partorjo v Federick Kiai* [1976] 2 MLJ 214). We are of the opinion that the fractures and the other connected injuries should be assessed together and not separately and then just added up at the end because they are not separate heads of compensation. (*Mahamad bin Mahamad Said & Anor v Perianayagam & Anor.*) The learned judge, however, gave allowance for overlapping. Although the principle applied was incorrect, we are of the view that the award of RM26,000 under this head is in no way manifestly excessive or unreasonable.

Unless there is a distinct remoteness between the disabilities and pain and suffering arising from different injuries, eg an injury to the genitals in a man resulting in impotency, and say a fractured jaw resulting in difficulty in masticating food, the approach in respect of assessing the damages for pain and suffering and loss of amenities should be towards awarding one lump sum.

The court was advised that the amount being awarded to quadraplegic plaintiffs for pain and suffering and loss of amenities had gone up to some RM180,000 and on that basis, it was submitted that the instant plaintiff should have been awarded between RM140,000 and RM150,000. While we are prepared to say that the RM100,000 awarded under this head was perhaps on the low side, we do not think that it should have been anywhere near RM140,000. However, we also do not think that the RM100,000 was so manifestly low that this court should increase the amount. It is trite that the appellate court should not give preference to its own figure simply because they disagree with the figure arrived at by the trial judge; it will only interfere if it is satisfied that the judge has acted on a wrong principle of law or has for other reasons made a wholly erroneous estimate of the damage suffered — see *Mallal's Supreme Court Practice* (2nd Ed) para 57/1/13. Applying that test in the instant appeal, in our judgment this court should not interfere with the trial judge's award of RM100,000 for pain and suffering and loss of amenities.

Now, the learned judge in computing the pre-trial loss of earnings of the plaintiff based it on RM350 a month, which was the salary she was paid at the time of the accident. There was evidence provided by the general manager of the company that she had worked for, that had she

A continued to work for the company, there would have been annual increments, as a result of which he speculated that by 1 September 1992 (date of trial), she might have been paid RM550 per month. However, the learned trial judge was of the view that the plaintiff should be compensated for the 119 months from the date of accident to the date of trial at only RM350 per month. He appeared to accept that there would have been some increments had she been able to and had continued to work for the company, but he refused to take into account that probability. This was because he thought he was precluded from doing so by the amendment to the Civil Law Act 1956, that resulted in there being the new s 28A(2)(c)(ii) which provides that in awarding damages for loss of future earnings, the court should take into account only the amount relating to claimant's earnings at the time she was injured, and 'shall not take into account any prospect of the earnings ... being increased at some time in the future'. What was overlooked by the learned judge was that the said amendment was only in effect from 1 October 1984 which was well after the cause of action arose in this case in 1982.

In rectifying this error made by the trial judge in respect of the computation of pre-trial loss of earnings (we have been invited to do so by the cross appeal), we do not think that we should assume that the plaintiff would have enjoyed an increment of RM20 for each of the years from October 1982 up to the trial of the action. It is to be noted that she had in fact not been given an increment for the second year or even the third year of her employment, and there does not appear to have been any salary structure or some scheme in respect of increments. In the light of the general manager's evidence tested against the fact that even in the third year of her employment there had been no increment, what the trial court should have done was to hold that there could have been increments in some years given on an ad hoc basis. And some allowance has to be made for contingencies — she might havwe fallen ill, her services may have been terminated and so on. Doing the best we can, we would compute the pre-trial loss of earnings at say RM400 for the 119 months to get, on a straight multiplication, RM47,600 which, as the judge acted on a wrong principle, is what we would allow under this head in substitution for the RM41,650.

In respect of future loss of earnings, the learned judge had agreed with counsel on both sides of the Bar that the plaintiff's retirement age should be taken as 55 years, which gave 22 years from date of trial (which, contrary to the submission of counsel for the defendants, is the date from which the number of years should be computed in respect of loss of future earnings and not from date of accident, because pre-trial loss of earnings is provided under another head of damages). From this 22 years, the learned judge properly deducted ⅓ for contingencies to have 15 years as a multiplier which the learned judge applied to the loss of earnings at RM350 per month in a direct multiplication (as opposed to using annuity tables) to obtain RM63,000. We think he was wrong on two counts. First, he should have directed his mind to and should have given an allowance for increments, and secondly he should have applied the annuity tables. For the period of working life after the date of trial, there would have been

other increments of salary albeit put into effect on an ad hoc basis. On the evidence available, we think it would be fair, for the purposes of computation of the lump sum to be awarded for loss of future earnings, to use RM500 as the amount that the defendants should compensate the plaintiff for loss of earnings for each month, from date of trial for the period of the 15 years, which was the multiplier accepted by the learned trial judge. The rationale for using the annuity tables is that since the order to be made is not that the defendants pay the plaintiff RM500 each month for the next 15 years but a lump sum paid in advance to cover the whole 15 years, the court has to assess what is the amount that should be ordered to be paid to the plaintiff at the date of the judgment, which if invested to give a return of say 5%pa would provide RM500 per month to the plaintiff for 15 years at the end of which period both the principal amount and all accrued interest would have been used up. What the annuity tables used in our courts show is what such an amount is, and for RM500 for 15 years the amount is RM62,280 which we round off to RM63,000, which coincidentally was the amount awarded by the judge. It is interesting to note that on a direct multiplier the amount would be RM90,000 for which the income alone on an investment at 5%pa would be RM4,500 per year or almost RM400 per month which pointedly demonstrates that unless the annuity tables are used, the plaintiff would get something substantially more than the amount that the court wanted to compensate her with.

Our attention was drawn to the judgment of the Privy Council in the Singapore case of *Lai Wee Lian v Singapore Bus Services (1978) Ltd* [1984] 1 MLJ 325 where Lord Fraser of Tullybelton, delivering the judgment of the Board, recommended the English practice of taking into account both the factors, contingencies and advance payment, in selecting the appropriate multiplier. If both these factors had been taken into account in arriving at the multiplier, we respectfully agree that it would be a case of double deduction if in computing the amount, the annuity tables were used in the manner we have applied them instead of using a direct multiplication. Such an error indeed appears to have been made (as was pointed out in the Lord Fraser judgment at p 329 of the report) by Chang Min Tat FJ in *Murtadza bin Mohd Hassan v Chong Swee Pian* [1980] 1 MLJ 216 where the nine actual working years left to a 46-year-old plaintiff was reduced to seven years 'for contingencies *and for the fact that he would be getting a lump sum*' (emphasis added). However, that case was an exception to the rule vis-à-vis the Malaysian practice which has always been that the only factor taken into consideration in reducing the actual working years is contingencies. The lump sum accelerated payment factor is met by the use of the annuity tables. It follows that there is nothing wrong with the Malaysian practice. There is no double deduction.

For the defendants, it was contended that the multiplier of 15 years should have been further reduced to allow for the fact that the plaintiff is a woman of marriageable age on the ground that there was the probability that she would have married. *Moriarty v McCarthy* [1978] 2 All ER 213 at p 217; [1978] 1 WLR 155 at p 160 was cited where O'Connor J refers to the principle as follows:

> If the plaintiff had been a man of 24 with an agreed net loss of earnings of £1,820 a year, nobody would quarrel with applying to it a multiplier of 15 and arriving at £27,500. When one is dealing with a young woman, it is said that a multiplier of 15 is too great, and the reason that that is said is this: if you look at the reality of the immediate pre-accident position, there was a girl who was working and earning money, but the probability was that in a given number of years, nobody can say how many, she would probably have got married, and not necessarily stopped working at once, but probably within a reasonable time have participated in the bearing and rearing of a family, and that at that time it is reasonably certain that she would have had to give up gainful employment outside the home, at least for a number of years. It is those considerations which led the court to say that for a young woman it is wrong to apply the same multiplier to this head of damage as for a man.

In that case which involved a young Irish woman, who had come out from Dublin to work in England, and where she was involved in the accident that had left her a paraplegic, the judge reduced the 15 years multiplier he would have applied to a man to 11 years to allow for the factor that had she not been disabled there was the probability that she would have married and ceased, at least for some time, earning a living. That was a 1977 judgment. Although the judgment is silent on it, it would seem that the judge took judicial notice of factors peculiarly relevant to the case before him: that young Irish women come out to England to earn enough to put aside a sufficient amounts to have a dowry, and thereafter return to rural conservative Ireland to get married, and once married and when the children came, ceased employment. We are not prepared to accept that in the 1980s, in Malaysia, a Chinese woman who marries would cease gainful employment as the children arrived. That was probably what young Irish women would have done in the United Kingdom in the 1970s and what Malaysian women may have done in bygone decades — but not in the 1980s. Even if it may have been relevant one or two decades ago to make some allowance for such a factor, to do so in these modern times is inconsistent with the realities of modern living.

We now come to the question of compensation for nursing care. The learned judge accepted the plaintiff's mother's evidence that since the plaintiff left the hospital on 5 March 1989 'she has had to help her daily in making her toilet (sic), washing her clothes and feeding her'. He went on to hold:

> Since leaving the hospital, were it not for her mother and sister, the plaintiff would have needed domestic help to assist her in her needs of daily living, and that that would be so for the rest of her life. Compensation must be given for the services rendered by her mother and sister just as if a domestic help had been engaged to assist her. (See *Siti Rahmah bte Ibrahim v Marappan & Anor* [1989] 1 CLJ 252.) I agree with the learned counsel for the plaintiff that RM350 is a fair sum for the monthly cost of engaging a domestic help, particularly one to look after a physically handicapped person.

The objective medical evidence supports this finding. Dato' Dr Loh found that 'though she had now recovered she was inco-ordinated with her hands

and unsteady when she walked ... she would be unable to lead a solely independent life because of these disabilities. These are permanent'. The lack of co-ordination of muscular action of the hands and legs provides corroboration of the mother's evidence of the plaintiff's inability to wash and cook, and to use the toilet and bath without assistance. No doubt the plaintiff's mother has been providing her services free of charge to her handicapped daughter but the courts have always compensated plaintiffs for the true value of the services that the plaintiff needs even though it is provided by a parent or other relative — see *Moriarty v McCarthy* at p 219. In *Siti Rahmah bte Ibrahim v Marappan & Anor* [1989] 1 CLJ 252 at pp 255 and 256, Abdul Malek J relied on and followed *Taylor v Bristol Omnibus Co* [1975] All ER 1107, where it was held that the item for care and nursing should not be less if the plaintiff is looked after at home, and that it was settled in England that compensation can be given in money for services rendered by parents. Abdul Malek J went on to award RM350 per month for the cost of caring for the 23-year-old female trainee teacher (which was what she was at the time of the accident) from Tanjong Malim, Perak who had become a quadriplegic as a result of brain injury.

In the instant case also, the learned judge thought that RM350 was a fair sum to pay for domestic help. There was the unchallenged evidence of the plaintiff's mother that they had sought the services of a maid and had been prepared to pay RM300 to RM400 per month, but that there were no takers. For the defendant, it was argued that the plaintiff did not need all the services that a maid could provide. The suggestion appeared to be that an amount somewhat less than what a full time maid has to be paid should be adequate compensation. In our judgment, a person who cannot cook for herself, needs assistance to go to the toilet, to bath and to even go in and around the kitchen during meal times, not to speak of going up and down the stairs (which is the opinion of Dato' Dr Loh) is not adequately compensated under the head of nursing care, unless a reasonable amount to engage at least a domestic maid on a full time basis is provided. The RM350 per month awarded by the trial judge is, in the context of the evidence, about right. In respect of future nursing care, the learned judge properly used the annuity tables and on the correct basis that the plaintiff could be expected to live up to age 60, but that an allowance should be made for contingencies. The appeal in respect of this award by the judge fails.

That leaves two items to be resolved in respect of both of which counsel before us have come to an agreement. It is agreed that:

(i) interest should be at 8%pa from date of judgment until realization in respect of the whole of the amounts awarded; and

(ii) that the agreed special damages was in fact RM2,000.

Accordingly, we would uphold the trial judge's award of RM100,000 for pain and suffering and loss of amenities.

As to the award of RM41,650 for pre-trial loss of earnings, we would increase it to RM47,600.

A In respect of future loss of earnings, although the approach taken by the learned judge was erroneous, for reasons different from that which influenced the judge, we have come to the identical amount awarded by him under this head of RM63,000, and accordingly that award will not be disturbed.

B The defendants fail in their appeal against the amount awarded for pre-trial and post-trial nursing care.

By consent, the agreed special damages will be increased to RM2,000 and the whole of the award will carry interest at 8%pa from date of judgment until realization.

C Since each side had a measure of success and a measure of failure in their respective appeals, we would order that each party bear its own costs of this appeal and cross-appeal.

There will be orders in the above terms.

Because of the brain damage suffered by the plaintiff, we direct that D the amount of the award made herein be paid to the solicitors for the plaintiff who will hold it in trust, and forthwith upon such payment seek directions from the court as to how the money is to be applied.

Order accordingly.

E Reported by Isabel Liong

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